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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

DK ART PUBLISHING, INC. et al.,

Plaintiff, Cross-defendant  
and Appellant;

DRITA KESSLER,

Plaintiff, Cross-defendant  
and Respondent,

v.

CITY ART, INC.,

Defendant, Cross-complainant  
and Appellant;

BEN SAEIDIAN et al.,

Defendants and Appellants;

THE LAW OFFICES OF RAMIN  
AZADEGAN et al.,

Objectors and Respondents.

B241051

(Los Angeles County  
Super. Ct. No. BC370549)

APPEAL from an order and judgment of the Superior Court of Los Angeles County, Alan S. Rosenfield, Judge. Affirmed.

Fraley & Associates, Franklin R. Fraley, Jr., and Sue-Ann L. Tran for Plaintiffs and Appellants DK Art Publishing, Inc. and Drita Kessler.

Gilbert, Kelly, Crowley & Jennett, Timothy W. Kenna and John J. Moura for Defendants and Appellants City Art, Inc., Ben Saeidian and David Saeidian.

Hinshaw & Culbertson, Linda L. Streeter and Lisa Y. An and Linda Streeter for Real Parties in Interest and Appellants The Law Offices of Ramin Azadegan and Ramin Azadegan

DK Art Publishing, Inc. and its president, Drita Kessler (together referred to as DK Art) sued City Art, Inc. and its owners, Ben Saeidian and David Saeidian (together, City Art) for, among other things, breach of contract and conversion, in connection with certain fine artwork DK Art delivered to City Art which was lost or damaged while in its possession. City Art cross-complained, alleging breach of a joint venture agreement. After a 12-day jury trial, DK Art won a verdict in excess of \$8,000,000 against all defendants who recovered nothing on their cross-complaint.

City Art contends the trial court erroneously denied its motion for a directed verdict. The motion did not seek entry of judgment in City Art's favor but rather sought only to limit plaintiffs' damages. In an appeal that was consolidated with this case, DK Art argues the trial court abused its discretion by denying its motion for sanctions based on an abuse of the discovery process.

We hold the trial court did not abuse its discretion by denying the motion for sanctions and that the court properly denied the motion for a directed verdict.

## I. FACTUAL AND PROCEDURAL BACKGROUND<sup>1</sup>

DK Art published and owned thousands of serigraphs and lithographs of the work of artist Tamara de Lempicka (the "Lempicka Art") as well as dozens of other original works of fine art and vintage art materials (the "Miscellaneous Art"). City Art was in the business of framing and selling artwork.

The Lempicka Art, which had been produced pursuant to a license granted by Ms. Lempicka's estate, consisted principally of limited edition serigraphs of nine original Lempicka works. DK Art acquired the inventory of, and the exclusive marketing rights to, the Lempicka Art between 1993 and 1997.

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<sup>1</sup> In accordance with the usual rules on appeal, we recite the facts in the light most favorable to the judgment. (See *Bowers v. Bernards* (1984) 150 Cal.App.3d 870, 872-874.)

DK Art delivered to City Art the Lempicka Art on consignment in October 2005, and the Miscellaneous Art for storage, repair, and/or resale over several subsequent months. In late 2006, DK Art demanded the return of all its property then in City Art's possession. When City Art refused the demand, DK Art filed this lawsuit. City Art cross-complained, alleging breach of a joint venture agreement.

The parties engaged in a contentious discovery process. A discovery referee was appointed to hear the 12 motions to compel which DK Art brought against City Art. DK Art sought, and was awarded, over \$273,000 in sanctions for City Art and its attorneys' misuse of the discovery process. The trial court denied DK Art's final sanctions motion. DK Art timely appealed from that order.

At trial, DK Art offered evidence to establish the value of the lost and damaged property at issue exceeded \$16,000,000; City Art's expert valued the property at as little as \$25,000. At the close of evidence, City Art moved for a directed verdict which the trial court denied. The jury returned a verdict for DK Art in the amount of \$8,277,135.

## II. DISCUSSION

### 1. DK Art's appeal of discovery order

After its attempts at discovery were repeatedly rebuffed, DK Art filed 12 motions to compel, which included requests for monetary sanctions against both City Art and its former counsel, Ramin Azadegan, in accordance with The Discovery Act, Code of Civil Procedure section 2016.010 et seq. These motions were heard by a discovery referee who made recommendations to the trial court. The referee recommended the trial court order discovery sanctions on three separate occasions: Report and Recommendation #3 dated August 25, 2010, recommended an award of sanctions in the amount of \$37,190 for DK Art's attorney fees and expenses as requested in motions 4, 5, 11 and 12; Report and Recommendation #4 dated January 3, 2011, recommended an award of sanctions in the

amount of \$68,302.50 for DK Art's attorney fees and expenses as requested in motions 1, 2, 3, 6, 7, 8, 9 and 10; and Report and Recommendation #9 dated August 4, 2011, recommended an award of sanctions in the amount of \$168,372.47 for DK Art's attorney fees and expenses incurred in connection with the 12 discovery motions after the filing of the motions in late 2009.

The trial court adopted the discovery referee's recommendations, concluded City Art had misused the discovery process and ordered it to pay DK Art a total of \$273,864.97 in attorney fees. This court affirmed those orders in an earlier appeal. (*DK Art Publishing, Inc. v. City Art, Inc.* (Oct. 11, 2012, B229122) [nonpub. opn.] )

As noted above, the referee's Report and Recommendation #9 concerned the attorney fees and expenses DK Art incurred in connection with litigating its 12 discovery motions after they had been filed. DK Art had initially sought to recover its expenses incurred from the time the motions were filed through the rulings on the motions, including proceedings before the trial court. However, the referee declined to recommend sanctions for any costs incurred in connection with proceedings before the trial court. Thus, the referee's Report and Recommendation #9 did not include those fees and expenses. Consequently, DK Art filed a separate sanctions motion in the trial court to recover the fees incurred litigating the 12 discovery motions in superior court. As DK Art explains, "Report #9 only reimbursed [DK Art] for expenses [it] incurred to respond to [City Art and Azadegan's] conduct in proceedings before the Discovery Referee, but did not reimburse [DK Art] for expenses [it] incurred to respond to that exact same conduct in Trial Court proceedings." It is the ruling on this motion that is before us on appeal.

The sanctions motion for the fees incurred in litigating the 12 motions before the referee was heard in the trial court on September 16, 2011. When it accepted the referee's recommendations and awarded \$168,372.47 in sanctions, the court noted, "I also feel and find that the monetary sanctions have been robust and adequate to compensate plaintiff for the stresses, if you will, of the discovery process."

The sanctions motion for the fees incurred in litigating the 12 motions before the trial court was heard in that court less than three months later, on December 7, 2011. After stating it had read and considered the parties' papers, the trial court heard arguments and denied the motion for additional sanctions. The court indicated the referee may have mistakenly assumed the trial court imposed a terminating sanction. The court then stated: "And I looked at the fact that we had two hundred and – was it seventy or some odd thousand dollars of monetary sanctions already ordered in the case, and I felt that that was substantial enough and that it could be handled . . . with a lesser sanction than the terminating sanction. . . ."

On appeal, DK Art contends the trial court erred as a matter of law in failing to grant the sanctions motion. It makes the following argument. The express language of the Discovery Act required the trial court to impose a monetary sanction unless it found substantial justification or other circumstances made a sanction unjust. The trial court had already found (by adopting the referee's Report and Recommendation #9) City Art and its attorneys' conduct before the referee with respect to the 12 discovery motions was improper. Yet the court also found, without explanation, the exact same conduct engaged in before the trial court was not sanctionable

We review discovery orders for an abuse of discretion. (*Doppes v. Bentley Motors, Inc.* (2009) 174 Cal.App.4th 967, 992; *Britts v. Superior Court* (2006) 145 Cal.App.4th 1112, 1123.) "“We resolve all evidentiary conflicts most favorably to the trial court's ruling [citation], and we will reverse only if the trial court's action was ““arbitrary, capricious, or whimsical.”” [Citation.]’ [Citations.] “It is [the appellant's] burden to affirmatively demonstrate error and, where the evidence is in conflict, this court will not disturb the trial court's findings.” [Citation.] To the extent that reviewing the sanctions order requires us to construe the applicable discovery statutes, we do so de novo, without regard to the trial court's ruling or reasoning. [Citation.]” (*Clement v. Alegre* (2009) 177 Cal.App.4th 1277, 1286, quoting *Sinaiko Healthcare Consulting, Inc. v. Pacific Healthcare Consultants* (2007) 148 Cal.App.4th

390, 401.) Awards of attorney fees for discovery violations are within the sound discretion of the trial court. (*Ghanooni v. Super Shuttle of Los Angeles* (1993) 20 Cal.App.4th 256, 262; *Britts v. Superior Court*, *supra*, 145 Cal.App.4th at p. 1123.)

Code of Civil Procedure section 2023.030, subdivision (a) states: “The court may impose a monetary sanction ordering that one engaging in the misuse of the discovery process, or any attorney advising that conduct, or both pay the reasonable expenses, including attorney’s fees, incurred by anyone as a result of that conduct. . . . If a monetary sanction is authorized by any provision of this title, the court shall impose that sanction unless it finds that the one subject to the sanction acted with substantial justification or that other circumstances make the imposition of the sanction unjust.”

The trial court had firsthand knowledge of the extensive discovery disputes which plagued this case. At the time of the hearing on the instant motion, the court had already ordered cumulative awards totaling more than \$273,000, which it described as “robust” and “adequate.” The court noted the “unique posture of the case” which involved “prior counsel who engaged in certain tactics and strategies that ultimately turned out to be costly versus new counsel who . . . engaged in a different approach to things.” The court’s denial of additional monetary sanctions was not arbitrary, capricious or whimsical.

DK Art relies on *Mattco Forge, Inc. v. Arthur Young & Co.* (1990) 223 Cal.App.3d 1429 to argue a prevailing party is entitled to “recover all expenses that flow from the continuing misuse” including subsequent litigation related to the original discovery violation. However, *Mattco* does not stand for the proposition that all claimed expenses flowing from discovery misuse must be mechanically awarded by the court as sanctions. *Mattco* found no abuse of discretion when the trial court awarded lesser monetary sanctions (one-fourth of the total requested) than the amount requested by the prevailing party on a motion to compel production of documents. (*Id.* at p. 1437.) The reviewing court found the trial court “selected an amount that was reasonable under the circumstances” and “the result was both fair and legally correct.” (*Ibid.*)

Here, after reviewing all of the facts and circumstances of the case, the trial court determined its prior sanctions orders had fully compensated DK Art for its reasonable discovery-related expenses. As the court in *Mattco Forge, Inc. v. Arthur Young & Co.*, *supra*, put it, that result was both fair and legally correct.

Finally, DK Art relies on *Do v. Superior Court* (2003) 109 Cal.App.4th 1210 to argue the trial court's denial of its motion was erroneous because the court did not find City Art and Azadegan acted with substantial justification. *Do* held that a litigant represented by pro bono counsel may be awarded its reasonable attorney fees even though those fees were not actually incurred. (*Id.* at p. 1218.) The opinion does not support DK's argument the trial court could not exercise its discretion to deny DK Art additional attorney fees after finding the sanctions already awarded were "robust," "adequate," and "sufficient enough."

## 2. City Art's motion for directed verdict

City Art's single assignment of error on appeal rests on the following argument. DK Art was authorized by the estate to sell only those pieces of the Lempicka Art, as identified in the "Licensing Agreements."<sup>2</sup> The "Consignment List,"<sup>3</sup> which served as

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<sup>2</sup> The written documents which permit DK Art to publish and sell the Lempicka Art are contained in four separate writings: (1) Letter dated December 2, 1993 from the lawyer representing Kizette de Lempicka Foxhall, Tamara de Lempicka's daughter and sole heir; (2) Memorandum of Settlement of a lawsuit filed in the United States District Court for the Southern District of Texas under Civil Action Number H-96-0854 entered into in August 1997, signed by Kizette de Lempicka Foxhall, her daughter Victoria D. Lempicka and Drita Kessler; (3) undated and unsigned draft Settlement Agreement and Mutual Release purporting to settle all claims in the above-mentioned litigation; and (4) Second Memorandum of Settlement, which incorporated, with slightly modified terms, the draft Settlement Agreement. These writings together are referred to as the "Licensing Agreements."



the basis of DK Art's calculation of damages, includes pieces of Lempicka Art in excess of those authorized by the Licensing Agreements. The trial court should therefore not have permitted the jury to award damages for works which DK Art was not authorized to sell pursuant to the Licensing Agreement. City Art maintains the trial court's "failure to determine, as a matter of law, that DK Art was entitled to a maximum value circumscribed by DK Art's settlement from the Lempicka estate, resulted in a vastly inflated verdict and an unjust windfall" to DK Art.

"A directed verdict is . . . subject[] to de novo appellate review."<sup>4</sup> "[T]he power of the court to direct a verdict is absolutely the same as the power of the court to grant a nonsuit." (*Estate of Lances* (1932) 216 Cal. 397, 400.) "A motion for a directed verdict is in the nature of a demurrer to the evidence, and is governed by practically the same rules, and concedes as true the evidence on behalf of the adverse party, with all fair and reasonable inferences to be deduced therefrom." (*Id.* at pp. 400–401, quotation marks omitted.)" (*Brassinga v. City of Mountain View* (1998) 66 Cal.App.4th 195, 210.) Thus, "Only if there was *no* substantial evidence in support of the verdict could it have been error for the trial court earlier to have denied [appellant's] motion for directed verdict." (*Howard v. Owens Corning* (1999) 72 Cal.App.4th 621, 630.)

Substantial evidence supports the verdict. Drita Kessler, as the owner of the Lempicka Art and the Miscellaneous Art, testified the retail value of all of the art was nearly \$13,000,000. Ben Saeidian signed a consignment invoice which stated the value of all of the Lempicka Art was approximately \$11,000,000. DK Art's expert testified the wholesale value of the Lempicka Art was approximately \$6,000,000. The jury was

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<sup>3</sup> The invoice which DK Art prepared to document the Lempicka Art delivered to City Art in October 2005 is referred to as the "Consignment List." Ben Saeidian signed this invoice, but indicated that the artwork was "not counted."

<sup>4</sup> "[A]ny party may, without waiving his or her right to trial by jury in the event the motion is not granted, move for an order directing entry of a verdict in its favor." (Code of Civ. Proc., § 630, subd. (a).)

instructed it could award additional damages for interest on both tort and contract theories of recovery, which could increase the damage award by as much as \$5,000,000. DK Art asked the jury to return a verdict of over \$16,000,000, while City Art essentially argued the plaintiffs were due nothing. The jury's verdict of \$8,277,135 was well within the range of the evidence presented at trial. The trial court properly denied City Art's motion for a directed verdict.

It was for the jury to determine DK Art's damages. Nothing precluded City Art from arguing that DK Art was not entitled to damages for extra prints it reproduced and transferred to City Art purportedly in violation of the Licensing Agreements. Indeed, City Art took the position that DK Art misrepresented the number of prints transferred to City Art and, in opening statement, appeared to indicate damages should be based on quantities of artwork identified in the Licensing Agreements.

Moreover, the contention the verdict violated the terms of the Licensing Agreement is unavailing. Leaving aside the issue of whether City Art is entitled to enforce for its own benefit the rights of the Lempicka parties under the Licensing Agreement, the argument assumes the jury awarded damages to DK Art for the loss or destruction of pieces of Lempicka Art which it was not authorized to sell. The verdict, however, was a general one, and did not indicate how the jury calculated the damages it awarded.<sup>5</sup> Thus, there is no evidence the jury awarded DK Art any damages in excess of those City Art concedes were warranted under the evidence.

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<sup>5</sup> The trial court cautioned the parties on more than one occasion that their ability to challenge the verdict on appeal would be severely circumscribed by the use of a general verdict. Counsel for all parties acknowledged the risks and chose to forego a special verdict.

### III. DISPOSITION

The order and judgment are affirmed. The parties are to bear their own costs on appeal.

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KUMAR, J.\*

We concur:

MOSK, Acting P. J.

KRIEGLER, J.

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\* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.